

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN MENZIES) Docket No. 15 C 03403
)
Plaintiff,) Chicago, Illinois
) November 15, 2016
v.) 9:01 a.m.
)
SEYFARTH SHAW, LLP, GRAHAM)
TAYLOR, NORTHERN TRUST)
CORPORATION and CHRISTIANA BANK)
& TRUST COMPANY,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE JOHN ROBERT BLAKEY

APPEARANCES:

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1 (In open court.)

2 THE CLERK: 15 C 3403, Menzies vs. Seyfarth Shaw, LLP.

3 THE COURT: Good morning. Appearances, please.

4 MR. CHARKOW: Jeff Charkow on behalf of the plaintiff,
5 your Honor.

6 MS. CHO: Amy Cho and Peter O'Neill on behalf of
7 Christiana.

8 MS. LARSON: Good morning, your Honor. Bates Larson
9 on behalf of defendants Seyfarth Shaw and Graham Taylor. I'm
10 expecting my partner, Mr. Gehringer, as well.

11 THE COURT: Please try to find the microphone. It
12 makes it easier.

13 MR. BERBERIAN: Good morning, your Honor. Nick
14 Berberian and Kyle Rettberg on behalf of Northern Trust.

15 THE COURT: How are you? If we still have one
16 attorney trying to get through security, do you mind if we pass
17 the case?

18 MR. CHARKOW: No objection, your Honor.

19 THE COURT: All right. Thank you, everybody.

20 MS. LARSON: Thank you, your Honor.

21 (The Court attends to other matters.)

22 THE CLERK: 15 C 3403, Menzies vs. Seyfarth Shaw, LLP.

23 MR. CHARKOW: Good morning, your Honor. Jeff Charkow
24 on behalf of the plaintiff.

25 MS. CHO: Amy Cho on behalf of Christiana.

1 MR. O'NEILL: Peter O'Neill on behalf of Christiana.

2 MR. GEHRINGER: Good morning, your Honor. Matt
3 Gehringer for Seyfarth Shaw and Graham Taylor.

4 MR. BERBERIAN: Good morning, your Honor. Nick
5 Berberian and Kyle Rettberg on behalf of Northern Trust.

6 THE COURT: Okay. We have three motions up today. Do
7 the parties want to argue those? And then I know they've all
8 been fully briefed and the Court's aware of it. But do you
9 want to argue your motions?

10 MR. CHARKOW: They've all been fully briefed. There's
11 some overlapping issues. I mean, how does your Honor want to
12 handle this?

13 THE COURT: Well, let me start with my standard
14 question. What's the status of the motions? Has there been
15 any movement since it was fully briefed?

16 MR. CHARKOW: I think there has been movement insofar
17 as we've now gotten the production from all the defendants of
18 the documents related to Mr. Ferenc, who was also invested in a
19 similar tax shelter at the same time as Mr. Menzies, and that
20 issue has been resolved.

21 I don't believe -- and I'm sure the team over here
22 will correct me if I'm wrong. I don't think we've resolved the
23 scope of defendants' involvement in other tax shelters or the
24 confidentiality and the privilege issues that have been raised
25 by the other --

1 THE COURT: Well, it's your motions or your motion.
2 So why don't you argue those three, and then I'll hear the
3 response and then everyone will have a chance to respond to
4 what everyone else is saying.

5 MR. CHARKOW: Certainly, your Honor. I think that
6 what we have, as alleged in our complaint, and based on the
7 information set forth in our briefs related to the discovery
8 we've gotten since that time, is the existence of an enterprise
9 and some continuity involving the players here.

10 And the issue is whether evidence of their involvement
11 in other tax shelters is relevant to the issues in this
12 lawsuit, to cut through some of the language here that's been
13 tossed about back and forth.

14 I think that we've set forth that, for example, with
15 Christiana, they had been involved in another substantially
16 similar transaction in which they base the documents on this
17 transaction. The correspondence between Christiana and Euram
18 Bank shows that they'd engaged in these sort of transactions
19 before, the same tax shelter.

20 They used the documents at issue for the basis for
21 Mr. Menzies' transaction. I believe Mr. Ferenc's, too, since
22 they were similar to each other. We know that this was a tax
23 shelter that was marketed broadly. We have received a white
24 paper describing in a seven- or eight-page document the details
25 of this transaction, which shows that it was instituted for

1 other investors. Yet we have not received any information or
2 complete discovery responses to, for example, Christiana's
3 involvement in what appear by all accounts to be substantially
4 similar tax shelters involving at least two of the
5 co-conspirators in this case.

6 The evidence in general of defendants' involvement in
7 other tax shelters is relevant under Federal Rule of Evidence
8 404(b)(2), which is really an exception to the rule, to show
9 the background of this transaction in question, to show the
10 motive, opportunity, intent and absence of mistake in executing
11 the two tax shelters for Mr. Menzies and for Mr. Ferenc.

12 In addition, I think the evidence goes to establish
13 the continuity of this enterprise. Not all of the members need
14 to be involved in every transaction in order for the
15 information to be relevant to prove specifically the continuity
16 element. And I don't think there's really any question, to the
17 extent that we were to survive, that defendants' other
18 involvement in tax shelters would be relevant under Rule 404.

19 In terms of the privilege and confidentiality thing,
20 that really needs to be addressed separately, I think. Because
21 as to Northern Trust and Christiana, there's a separate
22 argument than there is with respect to Seyfarth.

23 With respect to all of them, what we've asked for is
24 their involvement in fraudulent tax shelters defined
25 consistently with the IRS regulations. This is not the sort of

1 investment where customers are determined to have protection of
2 confidentiality. Given the very nature of the agreement, I
3 think that's set forth in the Seventh Circuit cases very
4 clearly.

5 With respect to Seyfarth, obviously those same
6 arguments apply. But even if the Court were to find that
7 there's a higher standard to apply to the attorney, they can
8 provide substantive responses without identifying the
9 individual -- the individuals that were involved and can
10 provide substantive responses either redacting or using John
11 Does or some other description that will allow them to provide
12 the information.

13 With regard to Seyfarth, we have an actor that was
14 involved in more than 10 years of criminal conduct, which he
15 testified to exclusively. The idea that this range of conduct
16 is not relevant to our lawsuit, I think, just strains
17 credibility.

18 The IRS certainly found it relevant when they audited
19 Mr. Menzies in 2012, that the person that had issued the legal
20 opinion had spent time in federal prison regarding other tax
21 frauds. And that's why we think the information is relevant,
22 we think can be provided consistent with the protection
23 provided under the confidentiality order in this case and
24 should be produced.

25 THE COURT: Who wants to go first?

1 MR. GEHRIGER: Your Honor, Matt Gehringer on behalf of
2 Seyfarth and Graham Taylor. A couple of things here. In terms
3 of what we have done, we have produced to him all of the
4 documents we have regarding the Menzies transactions and all
5 those things.

6 There's another guy by the name of Ferenc, who we
7 mentioned earlier, who was actually the co-founder of Applied
8 Underwriting, Inc., with Mr. Menzies. So he participated in
9 all the meetings together with Mr. Menzies, with Northern, with
10 Euram, with Seyfarth Shaw and effectively was doing the same
11 thing at the same time with him. And Mr. Ferenc has now -- we
12 have produced all those documents.

13 We have also produced anything to him or in this case
14 have told him that we are not aware of any other substantially
15 similar transactions with respect to anyone else that involve
16 members of the enterprise. So we have, in fact --

17 THE COURT: Wait. When you say members of the
18 enterprise, do you mean all of them or individually or
19 collectively?

20 MR. GEHRIGER: I do mean -- I do mean the enterprise
21 that he alleged, so yes, all of them, but not all -- the way he
22 alleged it in the complaint, it included a bunch of individuals
23 included within the enterprise. We did not include those. We
24 only included the entities, so that we didn't, you know, overly
25 limit this.

1 THE COURT: Well, obviously an enterprise, especially
2 an association of fact in terms of the life of the enterprise,
3 the membership can change.

4 So in determining which documents were responsive, did
5 you only include those documents in which all of the alleged
6 enterprise participants were involved, or did you include any
7 other relevant tax shelters where some, but not all of the
8 alleged enterprise members were involved?

9 MR. GEHRIGER: We restricted it to the substantially
10 similar transactions, the tax shelter, if you want to call it,
11 and to all members of the enterprise.

12 THE COURT: Okay. All right. Go ahead. I
13 interrupted you. I'm sorry.

14 MR. GEHRIGER: That's all right.

15 The one thing that's clear from the documents that
16 have been produced so far is that Euram, who is not here as a
17 defendant, designed this tax strategy. That's who designed it.

18 The white paper that he refers to that was produced in
19 this case, that's a white paper that Mr. Ferenc and Mr. Menzies
20 had in 2006 after these transactions. But they sent it to
21 Graham Taylor at Seyfarth Shaw and said here are the documents
22 that Pali Capital, which was a Euram entity, have produced to
23 the IRS, and they sent it to us.

24 So this idea that we found out that there's a white
25 paper, they had that from the inception because they sent it to

1 us from 2006. But in any event, what's clear is that other
2 than the Menzies and Ferenc tax strategies here, tax shelters
3 here, there are none other than these members of the enterprise
4 and Seyfarth or Taylor participated in that are substantially
5 similar to this one.

6 And in terms of the other tax shelters -- because I
7 think this is -- it's extremely important. Because he
8 essentially has found nothing to support the allegations of the
9 enterprise which he has alleged, what he's trying to do is lump
10 all the tax shelters together as some homogenous mass and seek
11 all discovery over an 11-year period regardless of any
12 similarity to the Menzies tax shelter and regardless of the
13 connection to the alleged members of the enterprise. That does
14 not meet either the relevance or the proportionality standard
15 under Rule 26.

16 For example, Judge, to give just an idea, he has not
17 asked only for illegal tax shelters or illegitimate tax
18 shelters. He asked for us to produce information on any
19 reportable transaction in which we had any involvement in any
20 capacity. That's wildly overbroad and not relevant, and I'll
21 tell you why.

22 There's no way to answer that, first of all, from our
23 perspective without reviewing every transaction over 11 years
24 of 850 lawyers. Because you may be involved in a transaction.
25 Whether you're the one doing the tax portion or not the tax

1 portion, you may be involved in that.

2 But more importantly, what would it find? Reportable
3 under the IRS code, it does not mean illegal. It doesn't mean
4 illegitimate. There are a bunch of different types of
5 transactions, four different types, that include confidential
6 transactions, transactions with contractual protection, loss
7 transactions of five different categories and transaction of
8 interest.

9 But probably most important, Judge, when you look at
10 the CFR that he cited to us as defining reportable
11 transactions, the very first section, subsection A, says, "The
12 fact that a transaction is a reportable transaction shall not
13 affect the legal determination of whether the taxpayer's
14 treatment of the transaction is proper."

15 So these are not illegitimate tax shelters. They're
16 not anything. What they are is transactions that the IRS has
17 interest in, that they want to look at and know about. And so
18 they put a requirement out on the taxpayer to actually disclose
19 them when they filed them on their tax returns. But it doesn't
20 say anything about them being part of a predicate act or an
21 illegal or illegitimate thing.

22 So what are we actually doing here? I mean, it seems
23 like we're taking reportable transaction, and we're going to
24 just wipe away the burden on Seyfarth and these other banks,
25 which are going to be in a similar position, and the rights of

1 third-party clients who have no connection whatsoever to this
2 lawsuit, and somehow force Seyfarth and these other people to
3 disclose a bunch of transactions that have no relationship to
4 this transaction either in substantial similarity or in the
5 members of the enterprise.

6 And what are we going to do with the information if we
7 disclose it? How can plaintiff make allegations or tie the
8 Menzies case into these others without knowing was it an
9 illegal tax shelter or abusive?

10 Was the client involved taken for a ride, or were they
11 completely in pari delicto if it was a bad transaction? Was
12 the client -- was there any predicate act involved under RICO?
13 Is there any commonality involved between the tax shelter and
14 the enterprise or the similarity of the tax shelter?

15 So the same problem exists with the concept of, oh,
16 yeah, produce every tax shelter with which you've had any
17 involvement at any time. You know, tax shelter is not in and
18 of itself illegal, and that's why his analogy that he uses in
19 the papers to the drugs and saying, well, it's like saying,
20 well, if you sold heroin, then I don't have to produce things
21 if I was selling cocaine.

22 Well, no, because every one of those drug sales is
23 illegal, and they're all potentially predicate acts under RICO.
24 And the tax shelters or reportable transactions are not that.
25 And the drug analogy also doesn't work because it's usually in

1 the affairs of the enterprise, and he's ignoring that as well.

2 So, Judge, in your opinion on July 15th, page 30, you
3 said, "Of course, under Section 1962(c), the pattern must also
4 be in the affairs of the enterprise. If not, liability will
5 not obtain." So if there's no connection to the enterprise,
6 there's no reason to discover this and certainly not to
7 discover it at this stage of the proceedings where he hasn't
8 stated a viable claim yet and where all the claims against my
9 client are barred.

10 The same thing you properly cited U.S. vs. Starell
11 (sic). "The pattern must regularly utilize the facilities or
12 structure of the enterprise or otherwise have an effect upon
13 the common affairs of the enterprise."

14 So the enterprise is important. I understand we may
15 disagree with respect to whether it's all members or some
16 members, but to just say every tax shelter or every reportable
17 transaction in which we were involved for an 11-year period
18 somehow now is going to be subject to the discovery when the
19 burden of that is incredible, the relevance is zero, just does
20 not make sense, Judge.

21 We cited a lot of cases to you and won't go through
22 them all here, but he didn't cite a single case to suggest that
23 unrelated bad acts are somehow relevant to pattern and even if
24 they aren't related to the enterprise.

25 So at this stage of the proceedings, Judge, I think

1 allowing plaintiff discovery, that broad-base discovery he's
2 talking about makes no sense and should not be allowed because
3 to allow far afield discovery with no clear relevance, no
4 relationship to the affairs of the enterprise, an incredible
5 burden on third parties and an incredible burden on the parties
6 themselves is neither relevant nor proportional to the needs of
7 the case.

8 Mr. Taylor, he's several times referred to him.
9 Number one, he didn't spend time in prison. That's not true.
10 But he was convicted for tax fraud. He pled guilty to tax
11 fraud related to something done in 1999, two law firms before
12 he got to Seyfarth Shaw. And none of -- he has not shown to
13 this day any relevance between that and what went on here.

14 He's got the transcript available to him from
15 Mr. Taylor's testimony, as he cited to the Court, and there's
16 still no way to show any relevance between those two. So just
17 dropping out the fact that Mr. Taylor was convicted of tax
18 fraud does not somehow create the ability to discover
19 everything under the sun.

20 THE COURT: Can you address the privilege issue?

21 MR. GEHRIGER: Yes. Our point there, Judge, is that
22 what he's asked for is tell us whether you were involved in any
23 capacity in a reportable transaction or tax shelters or -- I'm
24 trying to remember the other thing.

25 But the Seventh Circuit is clear that if you're

1 involved -- if you have to disclose the identity of a client,
2 and the identity of the client would, in fact, reveal why the
3 client sought your advice, which is exactly what responding to
4 that interrogatory would do, you can't do that. And that's
5 exactly what we'd be doing here, Judge.

6 The cases he has cited, both of them, involve
7 situations where the IRS has brought either lawsuits or
8 subpoenas to BDO Seidman, to Sidley & Austin. And in those
9 cases, they were involving reportable transactions. And they
10 said vis-a-vis the IRS, the client has no expectation of
11 confidentiality because those things by law have to be reported
12 to the IRS. But they are not reported to the world. They are
13 reported to the IRS.

14 So they may have no expectation of confidentiality to
15 the IRS, but I don't believe that all the clients who may have
16 consulted Seyfarth Shaw between 2000 and 2010 had no
17 expectation of confidentiality with respect to this kind of
18 lawsuit. So I don't think the attorney/client privilege goes
19 away.

20 THE COURT: Okay.

21 MS. CHO: Do you want a reply?

22 THE COURT: I think we should have each of the
23 defendants address, and then he can collectively respond.

24 MS. CHO: Okay. I don't want to repeat a lot of the
25 things that were said. But just to give you some background on

1 Christiana-specific issues. Christiana was asked by Euram to
2 be a trustee for trusts that were set up by Mr. Menzies. And I
3 don't think anyone disputes, from our review of the documents
4 and other parties' documents, Euram was the party that was
5 driving the bus. And in this stage, plaintiff could have
6 subpoenaed Euram, but it didn't.

7 And from where Christiana stands, we've produced
8 everything that is substantially related to the tax shelters at
9 hand. To be specific, we've produced documents, all documents
10 dealing with Mr. Menzies. And there was one other party that
11 everyone agrees entered into a substantially similar
12 transaction involving the alleged enterprise, and that was
13 Mr. Ferenc.

14 And once we received consent from Mr. Ferenc to
15 produce those documents, we produced those documents. We are
16 not aware of any substantially similar -- another substantially
17 similar transaction.

18 Now, Mr. Menzies confuses this issue and says there
19 are documents that reference a similar transaction. They
20 reference a similar trust. Now, Christiana was involved in
21 setting up similar trusts that were referred to by Euram, and
22 those documents were produced. I'm sorry, references to those
23 documents were produced. But just because they reference a
24 similar trust doesn't mean that they relate anything to do with
25 the substantially similar transaction.

1 The other issue Menzies argues is that it is entitled
2 to any document related to Euram. And a number of documents
3 referenced Euram because Christiana used Euram as an investment
4 manager of common funds that were invested primarily in foreign
5 investments. Now, similarly, just because Euram may have been
6 involved in a financial transaction does not make the details
7 of that transaction discoverable for the purposes of this case,
8 does not mean that anything related to Euram related to a tax
9 shelter in any way.

10 I believe a lot of the other issues raised in
11 plaintiff's motion are moot. Christiana has produced a
12 privilege log last week, and last night it produced a redaction
13 log and reproduced images that were previously redacted that
14 included Mr. Ferenc's name. But now that we have consent, we
15 have produced those documents.

16 And in short, we're just not aware of any other
17 substantially similar tax shelter.

18 THE COURT: Can you address whether or not you've
19 limited your production to substantially similar tax structures
20 involving all of the alleged members of the enterprise or
21 collectively or severably any individual or combination of
22 individual members of the enterprise.

23 MS. CHO: We have preserved our objection, but we're
24 not aware -- we're not withholding any documents related to any
25 substantially similar tax shelter related to this enterprise or

1 not.

2 THE COURT: So assume that instead of having all the
3 members of the enterprise involved in a substantially similar
4 transaction, there was one or just two as opposed to all three
5 or four members of the enterprise. You are not aware of any
6 document that you are withholding that would fall within that
7 category; is that correct?

8 MS. CHO: We're not aware of any -- we're not aware of
9 any documents, but we have preserved our objections to that
10 point.

11 THE COURT: Okay.

12 MS. CHO: Thank you.

13 THE COURT: Thank you.

14 MR. BERBERIAN: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. BERBERIAN: Nick Berberian and Kyle Rettberg again
17 on behalf of Northern Trust.

18 Your Honor, this is what we did. There are three
19 individuals that the plaintiff alleges in his complaint are
20 individual Northern Trust conspirators. They are not named as
21 defendants, but they are named within the body of the
22 complaint.

23 And these are senior people, your Honor. They're no
24 longer at Northern Trust. But it's Thomas Hines, who was the
25 national director of the financial consulting group; Mark

1 Harbour, who was head of the western region; and Michael
2 Niemann, who had primary contact with this particular
3 plaintiff.

4 We submitted -- not only documents, we submitted
5 affidavits on behalf of these three individuals, your Honor.
6 And what do those affidavits and documents show? And the
7 document search we did, your Honor, was over 11 different
8 custodians, these three professionals who worked with them they
9 reported to, were responsible for. We gave them the search
10 terms we utilized.

11 And the broad base of all of that disclosed the
12 following: One, Northern Trust never itself created or
13 designed tax shelters. It's not in that business, never has
14 been in that business. So there's no central file that we can
15 go to and pull out tax shelters, all right.

16 In part of the financial consulting services that were
17 provided to individuals, they would from time to time refer
18 them to entities, if there was an interest in engaging in such
19 transactions, legitimate tax planning. Euram was one of them.

20 Northern didn't receive any type of fee. It was
21 something that was solely a referral. The only persons that
22 they can identify that were referred for this transaction were
23 Mr. Menzies and Mr. Ferenc. Mr. Ferenc apparently unwound it,
24 but those are the only two.

25 But here's more important, your Honor, and this goes

1 to your question. We did not limit it to members of the
2 enterprise. We submitted affidavits from these individuals,
3 and our document search has revealed that on the basis of those
4 searches, that we have no record of any other substantially
5 similar tax shelter.

6 These individuals are not aware of any. Our search
7 didn't produce any. They also went on to say that they never
8 had any type of ongoing relationship with either Seyfarth or
9 Christianity -- or Christiana Bank.

10 So those were the scopes of our search. Your Honor's
11 order was, to determine the discovery that plaintiff wanted,
12 was how broadly defendants marketed the tax shelter issue.
13 Your order specifically referenced the representation that was
14 made by an oral argument that, quote, discovery might uncover
15 other sales by defendants of the purportedly abusive tax plan
16 to other victims.

17 We've searched extensively. There is no evidence of
18 marketing this tax shelter to anyone else. And more
19 importantly, on behalf of all the individuals that were
20 involved in these particular transactions, including very
21 senior people at Northern, and on the basis of the email
22 search, there is no evidence that we have found of any other
23 substantially similar tax shelters, whether they involve other
24 members of the enterprise or not.

25 If the defendant's not -- if the plaintiff's not

1 happy with that, they want us to come back and do a search that
2 is impossible to conduct. They want us to do a search over a
3 decade starting in 2000, over 16 years ago, of any transaction
4 with thousands of customers that somehow Northern may have
5 touched that may have involved some tax shelter of some ilk,
6 whether it was legitimate or not legitimate.

7 So, your Honor, there's simply no way that kind of
8 search could reasonably be conducted, and it wouldn't provide
9 any relevant evidence with respect to whether this particular
10 tax shelter, which is what is alleged here, was marketed to
11 anyone else.

12 This was simply not the business that Northern was
13 involved in. It was simply a referral. In this type of a
14 situation, a referral without a fee. And we have conducted an
15 enormous search to determine that there was nothing else either
16 with respect to Mr. Menzies or Mr. Ferenc on this particular
17 tax shelter. And all of the individuals that were involved had
18 no recollection whatsoever of anything that was substantially
19 similar.

20 Under the Illinois Banking Act, if we, Northern, are
21 required to produce documents relating to any other customer,
22 we have to provide them prior notice under the act. We found
23 no other documents that required us to provide such notice. So
24 we're not withholding any documents in that -- under that
25 statute once we got Mr. Ferenc's consent to release his. So I

1 don't want there to be any confusion there.

2 But what is clear is that there can be no
3 justification under the proportionality test for this enormous
4 search to cover thousands of customers over a 10-year period
5 for tax shelters that may or may not exist. Thank you, your
6 Honor.

7 THE COURT: Do you want to respond to any of that,
8 Counsel?

9 MR. CHARKOW: Your Honor, just briefly. I mean, this
10 has obviously been -- there's a lot more information in the
11 briefs, which I'm sure you've read.

12 We are not looking for run-of-the-mill tax advice.
13 We've said that to defendants over and over and over again. We
14 are only looking for abusive tax shelters. If they look at a
15 tax shelter and don't believe it's abusive, then that certainly
16 would be something that they can see. But the idea that a
17 reportable transaction is not a per se fraudulent or abusive
18 tax shelter is just not the case.

19 So we have narrowed the request to specific financial
20 arrangements that the IRS has found to be presumptively
21 fraudulent. It's possible, for example, for years people
22 challenged the Son of BOSS transaction that it could be
23 justified under the tax -- under the tax code. There were a
24 couple cases that found it, and then there were 78 cases that
25 rejected it.

1 So it is possible that somebody could argue that an
2 individual tax shelter is not fraudulent or abusive. But what
3 we've done is created a definition and parameters that describe
4 per se fraudulent tax shelters that we think are directly
5 relevant.

6 A couple things here. It was said earlier that we
7 could have subpoenaed Euram. Euram is an Austrian-based bank
8 that presently, as far as we can tell, does not have any
9 presence in the United States. Pali Capital, its operating
10 branch in the United States, has been dissolved in a
11 bankruptcy.

12 We are unaware of any way to receive documents
13 pursuant to -- against them other than some sort of
14 international thing. It's not entirely clear that they're even
15 a member of the Geneva Convention -- not the Geneva Convention,
16 the appropriate protocol, or that we could even get them, which
17 is why we haven't asked directly for documents from Euram.

18 We don't dispute that Euram designed this tax shelter
19 based on the information that we've had, but it is also pretty
20 clear that Christiana was involved in at least these two
21 transactions plus one other.

22 Not only did they base the trust document on that, and
23 the idea that this is just some unrelated transaction just
24 strains credibility, but when they entered into the subsequent
25 acts to transfer assets in and out of the trust documents, they

1 also referenced that it was similar to another transaction that
2 had involved Euram and Christiana Bank.

3 So based on the documents they have submitted to us,
4 even with redactions from other clients, they were involved in
5 another substantially similar transaction. And given there's
6 apparently some ambiguity on substantially similar, that's why
7 we had to broaden the definition to include other tax shelters
8 because it seems that they're making distinctions on these tax
9 shelters that are simply not material in terms of what is
10 the -- what is the enterprise at issue here.

11 Just quickly, with regard to Northern Trust, Northern
12 Trust did not say they didn't have any involvement. They said
13 that they did not recall that they had any involvement, number
14 one.

15 And number two, one of the three witnesses, in fact,
16 said that they had other transactions involving Euram. Euram
17 is one of the major players in the tax shelter industry at this
18 time, and the idea that they had other investment opportunities
19 with Euram certainly suggests that they did have involvement in
20 another tax shelter.

21 And finally, a very minor issue. Seyfarth Shaw may
22 have 850 lawyers. They don't have 850 lawyers practicing tax
23 law, number one.

24 Number two, to the extent that any one of these
25 defendants is involved in a reportable transaction, I find it

1 hard to believe that their legal departments or other sources
2 of information wouldn't reveal that. And simply hiding behind
3 the idea that it's for a 10-year period involving this sort of
4 issue I think is avoiding the fundamental issues.

5 THE COURT: Anything further on behalf of any party?

6 MR. GEHRIGER: Judge, the statement just there that
7 reportable transactions are per se presumptively fraudulent,
8 that could not be less right. I spoke directly from the CFR
9 that the fact that a transaction is reportable does not affect
10 the legal determination of whether a taxpayer's treatment was
11 improper.

12 Included within reportable transactions are five
13 different types of loss transactions, 10 million in any single
14 taxable year or 20 million in any combination of taxable years
15 by corporations. That's it.

16 That is not in any way, shape or form something that
17 is going to be presumptively fraudulent. And there are five
18 others just like that, Judge, that are just loss transactions.
19 So this idea that reportable transactions are presumptively
20 fraudulent or presumptively problem transactions, it just is
21 not correct, Judge. It's not true.

22 (Counsel conferring.)

23 THE COURT: You can talk, too. You don't have to
24 whisper. I'm happy to hear from you, Counsel, directly if you
25 want.

1 MR. GEHRIGER: Absolutely.

2 MS. LARSON: The additional point I was going make,
3 your Honor, is that with respect to the definition of
4 substantially similar, to the extent that the plaintiffs are
5 using our objection to that definition as grounds to expand the
6 scope of this vastly beyond anything that there's a
7 relationship to the Menzies -- what he's defined as the Menzies
8 tax shelter.

9 With respect to Seyfarth and Taylor, our objection to
10 that term was that it was circular. It said substantially
11 similar means the same or similar. We objected, clarified what
12 we were saying and said we were responding with respect to
13 transactions that were substantially similar to the Menzies --
14 to the Menzies tax shelter as it was defined.

15 There was a circularity that was easily removed, and
16 we removed it and used that definition for substantially
17 similar. It's not a justification for broadening this to every
18 conceivable reportable transaction.

19 THE COURT: I'll give you a chance, whatever you need
20 to say.

21 Do the defendants have any intrinsic objection to that
22 phrase "substantially similar" in terms of it being too vague
23 to respond? I know -- I'm not addressing tax shelters being
24 too broad or reportable too broad, just the phrase
25 "substantially similar." Do the parties have any trouble

1 figuring out what that means?

2 MR. GEHRIGER: Well, Judge, we did and partly because
3 he also included another definition, a grantor trust, grantor
4 remainder reversionary trust with substituted assets.

5 And, you know, when he was talking about a transaction
6 like that, I mean, we said we were going to respond on those as
7 well. Now, I know the banks may have different issues with
8 those because I think they see a lot of that, but it has
9 nothing to do with tax shelters.

10 So we didn't have any problem with substantially
11 similar, and we were not trying to say it had to be this tax
12 shelter, the Menzies tax shelter. It had to be one that --

13 THE COURT: What about the other --

14 MR. GEHRIGER: -- that works the same way.

15 THE COURT: -- defendant? The phrase "substantially
16 similar," do I have to worry about you having trouble with that
17 phrase?

18 MR. BERBERIAN: On behalf of Northern Trust, your
19 Honor, we had no problem with that phrase.

20 THE COURT: Okay.

21 MR. GEHRIGER: We can live with it as well, Judge. No
22 problem.

23 THE COURT: How about you?

24 MS. CHO: Same with Christiana.

25 THE COURT: Okay, great. I interrupted you. You were

1 going to say something.

2 MR. BERBERIAN: No, your Honor. I was just going to
3 add -- thank you, your Honor. This notion that we can easily
4 identify reportable transactions, Northern Trust is not in this
5 business. The people that had responsibilities for reportable
6 transactions or, quote-unquote, material advisers --

7 THE COURT: You got to slow down a little bit,
8 Counsel.

9 MR. BERBERIAN: Thank you. Who get paid a fee for
10 that business. So we check. So we don't have any way of
11 identifying that other than a Herculean task of trying to find
12 out whether over a decade, the thousands of customers that
13 Northern Trust services may have been engaged in a reportable
14 transaction with someone else. We just don't have any way of
15 doing that. We searched for that.

16 And we also -- your Honor, it's not only on the basis
17 of the recollections of three affidavits of people that they
18 allege -- and they're not happy with being alleged -- as being
19 individual Northern Trust conspirators under RICO, but our
20 email search revealed the same thing.

21 Whether it was with Euram or anybody else, anything we
22 turned up did not produce any tax shelter that was
23 substantially similar to this one. Thank you, your Honor.

24 THE COURT: All right. Anything further on behalf of
25 anybody?

1 MS. CHO: Just one issue regarding this other
2 transaction involving Euram. It didn't have to do with any of
3 the other individuals in the enterprise. As I had mentioned
4 before, it was similar to the trust, but not similar to the
5 transaction.

6 And frankly, we have no problem producing documents
7 related to that trust so long as we get consent from that
8 client or the Court orders us to under the Illinois Banking
9 Act. I don't think it's relevant and I don't think it's
10 problematic. But if plaintiff wants information related to
11 that third transaction or that third trust, that's fine.

12 THE COURT: Okay. Anything else?

13 MR. CHARKOW: It's referenced at two separate times,
14 your Honor. And because of the redactions, I can't tell
15 whether it's the same transaction or not. So anyway, that's
16 where we're --

17 THE COURT: Well, you guys can meet and confer on
18 that. It sounds like you guys are close to figuring that out.

19 Okay. Anything further on behalf of any party?

20 Okay. Based on the representation of the parties, it
21 might seem that it may ultimately appear that some of the
22 parties are actually in compliance with the Court -- with the
23 order that the Court's going to enter.

24 I'm going to grant in part and deny in part all three
25 motions to compel, which is Docket Entry 70, 73 and 76. I'm

1 not going to require production of tax shelters or reportable
2 transactions. That's too broad and not proportional under the
3 applicable rules.

4 However, substantially similar tax shelter schemes
5 will be produced. And as you've indicated, it seems like the
6 parties might be in compliance with that. But I'm not going to
7 limit it to those tax shelter schemes involving all of the
8 members of the enterprise. It must include any member of the
9 enterprise.

10 Because the change -- the association, in fact,
11 obviously can include membership that changes over time, and I
12 believe it's proportional and appropriate. Because, of course,
13 we're talking about what's discoverable, not necessarily what's
14 admissible.

15 So substantially similar tax shelter schemes,
16 including the members of the enterprise or any or all
17 individual members, either a subset or an individual or all of
18 them need to be produced.

19 All of those are going to be produced subject to
20 whatever privilege log or confidentiality orders the parties
21 want to work out. I am ordering it, so you do have the benefit
22 of a Court order in terms of some of your statutory compliance
23 issues. So you have the benefit of that.

24 But if there's additional privilege log that becomes
25 necessary or the parties want to enter into an agreed

1 confidentiality order, that's pretty routine, and you can take
2 a look at my standing orders to see how to proceed forward with
3 that, if it's necessary.

4 Is there anything else the parties need to address
5 today in light of the Court's ruling?

6 MR. CHARKOW: I guess a time frame, and then I believe
7 the next step would be our amending our complaint, your Honor.
8 So just to identify that, or if you'd like us to come back for
9 a status.

10 THE COURT: How long do the parties propose for
11 another status?

12 He's obviously going to need to digest discovery
13 depending -- I don't know how much additional discovery that my
14 order's going to produce, but let's assume it produces some.
15 He's going to need time to digest that before amending the
16 complaint. So how long do you think?

17 MR. GEHRIGER: Only because Thanksgiving is there,
18 Judge, can we have 21 days?

19 THE COURT: How about 30? Gloria, give me a date
20 about 30 days out depending as long as that doesn't put us
21 right in the heart of -- what's that look like?

22 THE CLERK: We can do Wednesday, December 14th at
23 10:00 a.m.

24 THE COURT: Is that good? Is December 14th good for
25 the parties? That's kind of like in between the two holidays.

1 What time, Gloria?

2 THE CLERK: At 10:00 a.m. Judge.

3 THE COURT: 10:00 a.m. All right. I'll see you all
4 then. Take care.

5 MR. GEHRIGER: Thank you, your Honor.

6 MR. BERBERIAN: Thank you, your Honor.

7 (Concluded at 9:47 a.m.)

8 * * * * *

9 C E R T I F I C A T E

10 I certify that the foregoing is a correct transcript of the
11 record of proceedings in the above-entitled matter.

12

13 /s/ LISA H. BREITER
14 LISA H. BREITER, CSR, RMR, CRR
Official Court Reporter

November 21, 2016

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